

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

ePLUS, INC.,	:	
	:	
	:	
v.	:	Civil Action
	:	No. 3:09CV620
LAWSON SOFTWARE, INC.,	:	
	:	
	:	
Defendant.	:	July 16, 2010
	:	
	:	

COMPLETE TRANSCRIPT OF **CONFERENCE CALL**  
BEFORE THE HONORABLE ROBERT E. PAYNE  
UNITED STATES DISTRICT JUDGE

15 APPEARANCES: (All via telephone)

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(The proceedings in this matter commenced at 2:00 via conference call.)

THE COURT: Hello. This is ePlus v. Lawson Software, 3:09CV620. Who is here for whom, starting with counsel for the plaintiff? And please give your name when you speak each time.

MR. MERRITT: Craig Merritt for ePlus, Your Honor.

MR. ROBERTSON: Scott Robertson, Your Honor,  
from Goodwin Procter. And I have with me my partner  
Jennifer Albert.

MR. CARR: Judge, for Lawson Software, this is Dabney Carr, and I have on the line with me Kirstin Stoll-DeBell, who is with Merchant & Gould and I don't believe has yet appeared before you in this case.

MS. STOLL-DeBELL: Good afternoon, Your Honor.

THE COURT: Hello.

MR. CARR: And that's everyone, Your Honor.

THE COURT: All right. Where is Mr. McDonald?

MR. CARR: Mr. McDonald is on his way to Europe.

THE COURT: For a vacation?

MR. CARR: Yes, sir.

1           THE COURT: Well, isn't that nice.

2           When are the briefs due on the summary  
3 judgment motions on the Bilski question?

4           MR. ROBERTSON: Your Honor, this is Scott  
5 Robertson. We filed our opposition today at noon, and  
6 I think Mr. Merritt is going to deliver a courtesy  
7 copy to chambers.

8           MR. CARR: Your Honor, this is Dabney Carr.  
9 Our reply brief is due on Monday.

10          THE COURT: All right. We have arguments in  
11 this case?

12          MR. CARR: Yes, Your Honor. This is Dabney  
13 Carr. The argument on all the summary judgment  
14 motions as well as the motions in limine is set for  
15 July 28.

16          THE COURT: All right.

17          What is it that possessed ePlus to file 6- or  
18 700 pages of expert report, Mr. Robertson? Where did  
19 you get the notion that that is an appropriate thing  
20 to do?

21          MR. ROBERTSON: Your Honor, I feel like we're  
22 being penalized for being too thorough here in this  
23 instance. What we did, Your Honor, is marshal all the  
24 evidence we had to establish the infringement.

25          Obviously, I didn't want to be accused of

1 withholding anything from the defendant as to our  
2 infringement contentions.

3 Back in December, 30 days after the pretrial,  
4 we produced 300 pages of claim charts based on the  
5 evidence we had at that time and were able to process  
6 as to what we thought the infringing systems were.  
7 There are a number of different documents,  
8 demonstrations, deposition testimony, all that  
9 establish that Lawson is infringing the 13 claims  
10 that are asserted.

11 THE COURT: How long do you think it will  
12 take you to present that case to the jury?

13 MR. ROBERTSON: Four and a half days.

14 THE COURT: Well, here's what I think I'm  
15 going to do. I'm going to get you to take your most  
16 representative claim that best represents the patent,  
17 and you'll get a couple or three days, four days  
18 total, to try that, all of you, and that's both sides,  
19 and then we'll see what happens. What's wrong with  
20 that idea?

21 MR. ROBERTSON: Your Honor, there are many  
22 overlapping elements in these claims. If you  
23 establish there's a computer operating system, that  
24 there's a database that has catalog items that they  
25 can establish inventory, the proof for these things

1 really does sum up very nicely in order to be able to  
2 say that here are why the 13 claims, which Your Honor  
3 will remember I narrowed from 79 at your suggestion  
4 and request, are all infringed.

5 It's not the number of claims, Your Honor,  
6 that presents the problem. I can do it with some  
7 demonstrations. I can do it with some documents. And  
8 there are some admissions from the Lawson 30(b) (6)  
9 representatives, and there's also the source code that  
10 took us 350 hours to dissect, Your Honor, having to  
11 look at it in a secure room under a protective order  
12 to bring my expert back and forth to D.C. on seven  
13 occasions at great expense. I've been able to do this  
14 with respect to Judge Brinkama and Judge Spencer in a  
15 very focused presentation.

16 So, Judge, we shouldn't get caught up on the  
17 number of claims.

18 THE COURT: I'm caught up on the trash that's  
19 in the case. I've got, I don't know, 15 motions in  
20 limine and most of them are silly and unnecessary.  
21 You should be able to work these things out.

22 I've read the motions for summary judgment  
23 that are ripe. It looks to me like the fact disputes  
24 run through them all, and there isn't any way to grant  
25 summary judgment. I'm not even inclined to hear

1 argument on them, to tell you the truth.

2 I don't know about the Bilski issue because I  
3 haven't head anything but the opening brief on that.  
4 I think I understand what the issue is, and I doubt  
5 that summary judgment can be granted as to it, but I  
6 have no informed opinion on it.

7 These motions in limine, where on earth does  
8 ResQ tell us to disregard the Georgia-Pacific factors,  
9 Mr. Robertson? Those factors require persons not  
10 acting under compulsion and dealing at arms' length to  
11 have a negotiation. And I don't read anything in  
12 those cases, except for ones I saw from the Eastern  
13 District of Texas, that warrant changing the basic  
14 approach to make this a trial on the basis of what  
15 you've extracted from other people under circumstances  
16 not covering Georgia-Pacific.

17 I can't understand why, Mr. Robertson, you  
18 have so many experts when the pretrial order is clear  
19 as a bell. It says you have one expert per  
20 discipline. You took one per topic and then split  
21 everything up.

22 There's no way the case is going to get tried  
23 in four days if all those experts testify the way  
24 you're talking about. It's just not going to happen.  
25 And that's one of the reasons why that order was

1 issued. I haven't even really gotten into the study  
2 of ePlus' motions in limine. But I will tell you that  
3 I don't think you're on very sound ground on much of  
4 any of the things that they have raised in their  
5 motions in limine. I don't need to hear from  
6 Professor Manbeck to tell about somebody's state of  
7 mind. He's no expert in state of minds.

8 If he testifies, and it's appropriate to  
9 testify about reexamination, if the issue somehow  
10 comes up, which I don't think it will, then that's one  
11 thing, but that's not where we are. And you're  
12 proposing to have him testify to what they should have  
13 known or what their state of mind was. You can't do  
14 that.

15 MR. ROBERTSON: Yes, Your Honor.

16 THE COURT: These are just a few of the  
17 things that I see that are going to foul this case up,  
18 and I'm looking for a way to simplify this case. And  
19 I believe, upon reflection, as I've studied all these  
20 papers. Obviously, I haven't studied things that  
21 haven't been filed. And there are a number of things  
22 that have been filed that I'm still looking at, but it  
23 seems to me as if this matter gets tried very simply  
24 by having you take your most representative claim  
25 where once a jury makes a determination on that, we

1 will be able to decide how to approach the case better  
2 either from litigation or settlement, and it may be  
3 that that will give us a sound basis for preclusion  
4 one way or the other. And it will be a manageable  
5 case.

6 Otherwise, I'm looking at a case that I don't  
7 see how you're going to get it tried in less than four  
8 or five weeks, and I don't intend to do that.

9 MR. ROBERTSON: Yes, Your Honor. This is  
10 Mr. Robertson if I might quickly react to some of your  
11 observation.

12 No. 1 is we presented 13 claims before Judge  
13 Spencer in four days. It's not claims, Your Honor,  
14 it's the substance of the elements that we need to  
15 prove. Even if we did represent and claim three to  
16 four, it still would establish infringement in 13  
17 claims, and I can do that in the same manner that I  
18 did in front of Judge Spencer.

19 THE COURT: Yeah, but you didn't have in that  
20 case 6- or 800 pages of expert exhibits either.

21 MR. ROBERTSON: Yes, we did, Your Honor. We  
22 had essentially the same substance in the expert  
23 report. And it's the same issues that have been  
24 presented in Ariba, the same issues that have been  
25 presented in SAP, and the same arguments that have

1   been presented in this case, and we had to track  
2   through 8 million pages of documents, Your Honor, in  
3   order to get there. We had to take depositions  
4   repeatedly because witnesses were ill-informed as to  
5   the facts that we were asking for.

6               Eight million pages, Your Honor, is the  
7   equivalent of 2 1/2 times the height of the Empire  
8   State Building that I had to weed through and hire 11  
9   outside contractors for me to do that.

10              Now, your point about Mr. Manbeck on the  
11 willfulness issue. You know, Your Honor, we arranged  
12 to have a discussion with Mr. Dabney and with Merchant  
13 & Gould on Monday because I realized that we  
14 overburdened the Court with all these motions in  
15 limine. I will observe that we've only filed nine.  
16 Lawson's filed 12. They've filed two summary  
17 judgments. And as for their 12 motions in limine, I  
18 would characterize seven of them has stealth summary  
19 judgments in which they sometimes just verbatim cut  
20 and paste from their summary judgment briefs.

21              I don't understand what the purpose of that  
22 is because we had hearings on how many summary  
23 judgments they could have and what the page limits  
24 would be. It's either one or two things. They are  
25 either trying to evade the page limits or they're

1 trying to evade the number of summary judgments. But  
2 we can cut this down. And right now, given the  
3 Court's observation, I will represent that I will  
4 withdraw Mr. Manbeck on this issue of willfulness if  
5 they'll withdraw their patent lawyer expert,  
6 Mr. Lipscomb, on the same issue, and we'll just let  
7 the jury decide whether they have willfully infringed,  
8 which is the province of the jury in any event. So I  
9 can just take that off the table right now, your  
10 Honor.

11 True to my word at the pretrial, I didn't  
12 file a motion for summary judgment. I think when the  
13 defendant filed a motion for summary judgment on seven  
14 separate issues and then filed a Bilski summary  
15 judgment on what by all accounts from everybody in the  
16 patent bar is a big nonevent from the Supreme Court,  
17 it just burdens this court. So we're happy to take  
18 whatever we can off the table, but I want to be able  
19 to fairly try my case. And to be held off on the  
20 sense that I disclosed too much in my expert report  
21 kind of suggests to me, Your Honor, that no good deed  
22 goes unpunished.

23 I wanted them to be fully aware of what we  
24 were going to be offering in the way of infringement,  
25 whether it be source code, which took us weeks to

1       decipher, or whether it be the documents they  
2       late-produced, or whether it be our efforts to try and  
3       demonstrate that representations made in sworn  
4       interrogatories were just not accurate, in fact, were  
5       not truthful, and we had to go and take third party  
6       depositions of.

7                  THE COURT: Wait a minute. You're telling me  
8       that you want to put before the jury the fact that  
9       they made representations in interrogatories that  
10      weren't signed by the witnesses, and you went to see  
11      other witnesses and found out other information; is  
12      that what you're telling me?

13                  MR. ROBERTSON: I can give you an example.  
14       This is Mr. Robertson again.

15                  THE COURT: Do you understand that that isn't  
16      the office of the jury in this case? If there's a  
17      problem in that respect, it sounds to me like that's a  
18      sanctions issue that you can bring after the trial.

19                  MR. ROBERTSON: Well, Your Honor, I do want  
20      to be able to enter the evidence that negates the fact  
21      that what they offered in their interrogatory answer  
22      is not true.

23                  THE COURT: You mean you want to put up a  
24      strawman and knock him down?

25                  MR. ROBERTSON: No, Your Honor. I just want

1 to put up affirmative evidence that what we say is  
2 true because we went out and deposed customers of  
3 Lawson.

4 Let me give you a specific example, Your  
5 Honor, so we're not talking in the abstract.  
6 Representation was made to you that Lawson just  
7 doesn't do catalogs. In fact, in hearings and in the  
8 pretrial Mr. McDonald represented that we just give  
9 them the empty software, and they go load the  
10 catalogs, and we have no idea what they're doing.

11 We deposed four customers. In every  
12 instance, those customers said Lawson came in and  
13 loaded the catalog data, implemented and assisted us.  
14 And we chose those customers almost randomly, Your  
15 Honor, and then we did a 30(b)(6) of one of their  
16 implementation witnesses, and they said yes, in many  
17 instances we load the catalog data. That's exactly  
18 contrary to what they say in their interrogatory  
19 answers.

20 THE COURT: Well, then you were required  
21 needlessly to go take a bunch of depositions and incur  
22 a bunch of expense, and you're entitled to put on  
23 evidence of the affirmative point if it's relevant,  
24 but you don't put on the evidence that establishes  
25 that they said this, and now you're proving the

1 opposite of it.

2                 The way to do that, if you've got an  
3 objection on that point about how ill treated you  
4 were, that's a sanctions motion, and you can deal with  
5 it later.

6                 MR. ROBERTSON: Indeed, Your Honor. We had a  
7 telephonic hearing on this. I know this is probably  
8 ancient history to you, but we had a hearing on this  
9 on March 25, and you ordered them to answer our  
10 interrogatory answers on implementation. And they  
11 waited another two weeks before they answered it, and  
12 even then the answer was inadequate.

13                 We had several correspondence back and forth,  
14 and we never heard from them again. So, yes, this  
15 will be one of the issues we will be raising at the  
16 July 28 hearing on a motion in limine.

17                 Look, I don't want to raise strawmen  
18 arguments, Your Honor, but I do need to affirmatively  
19 prove that they implement catalogs because that's part  
20 of their non-infringement defenses, that they don't do  
21 it.

22                 MR. CARR: Your Honor, this is Dabney Carr.  
23 If I might interject here. I just want you to know  
24 that we contest what Mr. Robertson has been saying and  
25 his characterization of the evidence.

1           I don't think it helps in this call to get  
2 down into these details, but I didn't want to go  
3 unresponded to.

4           THE COURT: All right.

5           MS. STOLL-DeBELL: Your Honor, if we can  
6 respond to your proposal for -- this is  
7 Ms. Stoll-DeBell by the way. If we can respond to  
8 your proposal, try a representative claim, I think  
9 that's an excellent idea.

10          Mr. Robertson says all 13 claims are the  
11 same, but they're not. There are some that are means  
12 plus function claims, there are some that are method  
13 claims. There are some that require requisitions, and  
14 some that don't.

15          There are five different accused products for  
16 each of these 13 claims, and it's unbelievably  
17 complicated to try to sort all that out for the  
18 infringement case, let alone the invalidity case.

19          MR. ROBERTSON: Your Honor, this is  
20 Mr. Robertson, if I might briefly respond.

21          It's no more complicated than the SAP and the  
22 Ariba case. And Judge Brinkema tried the Ariba case  
23 in eight days.

24          THE COURT: Do you expect me to buy the  
25 assertion that you've been through two trials and

1 learned nothing? And that you haven't changed your  
2 approach to the trials based on what you've learned?  
3 Come on. As the old boy said, "I fell off the turnip  
4 truck, but it wasn't last night."

5 MR. ROBERTSON: Your Honor, this is  
6 Mr. Robertson. I've learned much in those two trials.  
7 And what I'm trying to represent to you is through  
8 those two trials I was able to do in four, four and a  
9 half days, and the Court can hold me to that. Let me  
10 put my proofs on, and let me sum up and show how those  
11 proofs satisfy the elements of those 13 claims.

12 If we're going to start talking about  
13 representative evidence, what are we going to do with  
14 the defendants' invalidity positions which still are  
15 not confined to the Court's order. In fact, they  
16 filed opposition briefs that said this court has  
17 decided nothing with the scope of what the invalidity  
18 positions that can be offered at trial are. And I can  
19 cite to you exact page and line of that if you want to  
20 see it.

21 I thought it couldn't have been more crystal  
22 clear that the Court made some orders that restricted  
23 the defendant as to what invalidity position they  
24 could take, but apparently the defendant -- when the  
25 Court has an opportunity to read their motions in

1 limine and their opposition to ours, in their view,  
2 hasn't decided anything.

3 MS. STOLL-DeBELL: Your Honor, we dispute  
4 that. I'm not sure what Mr. Robertson is talking  
5 about.

6 THE COURT: Let me ask you something. How  
7 can you dispute something that you don't know what  
8 he's talking about?

9 MS. STOLL-DeBELL: I think it's not our  
10 position that you have not limited our invalidity  
11 case. We understand that our invalidity case is  
12 limited. We have narrowed the number of references  
13 that we rely on, and the invalidity arguments, the  
14 non-prior art arguments that we are relying on. So I  
15 don't believe that we have ever said we think it's a  
16 free-for-all for invalidity. We understand we need to  
17 be focused. We need to stick to the references that  
18 we have put in our contention responses, and we intend  
19 to do that.

20 And with respect to Mr. Robertson's comments  
21 that he shouldn't be punished for being too thorough,  
22 they have more than 400 pages of new information and  
23 at least six new arguments that were never disclosed  
24 to Lawson. They didn't say a peep about these search  
25 indexes until Dr. Weaver's report. So he was not too

1       thorough. He was not thorough enough. We had no  
2 notices of any of these arguments that they are  
3 making, and for the most part they don't even dispute  
4 that they are new.

5           If you go through the highlighted exhibits  
6 that we've provided you, Your Honor, Exhibits 3  
7 through 5 are Dr. Weaver's 600 pages of claim charts.  
8 Those are highlighted. Exhibit 12 is Mr. Niemeyer's  
9 report. A substantial amount of that is highlighted.

10          We will be submitting today a copy of  
11 Dr. Weaver's main report, which is 130-plus pages  
12 long. A substantial part of that is highlighted.  
13 These are new arguments they didn't disclose, and they  
14 waited until after we narrowed our invalidity case to  
15 come up with these new arguments. And because of  
16 that, we are really -- our hands are tied to defend  
17 against them. And the case is already so complicated,  
18 it's just totally unfair.

19           MR. ROBERTSON: Your Honor, this is  
20 Mr. Robertson. Let me just briefly respond.

21          On a hearing on the merits, I can demonstrate  
22 how that is just not true. In fact, part of the  
23 problem we had is we didn't get an expert until March  
24 who told us they actually had a search index. Until  
25 then, their sworn interrogatories always said they

1       searched the entire database.

2               Let me briefly explain why that is important,  
3       but I'd like to have a hearing on this. And that is a  
4       search index is a simple tool that lets you search a  
5       database to identify the actual data record you want.  
6       It's much like a book that has an index.

7               If Your Honor was reading a book on the Civil  
8       War and wanted to go to the first battle of Bull Run,  
9       you could go through the book page by page looking for  
10      it or you could go to the search index, see where the  
11      Battle of Bull Run was referenced at 237 to 241, and  
12      go right to it and find the data record.

13              We always knew they did it that way, but  
14       their interrogatories said no. It wasn't until we  
15       were able to go the source code and get a witness in  
16       March that for the first time they conceded they had a  
17       search index.

18              So I don't know how I could have put that in  
19       the initial contentions when they represented they  
20       didn't do it that way, and we had to look at the  
21       source code, and we had to get a witness that would  
22       then admit it.

23              There are a lot of issues in this. I will  
24       represent to the Court that on a hearing on the merits  
25       on this matter I can establish that we have not

1 asserted infringement against any new products or  
2 services that we didn't previously identify in  
3 Dr. Weaver's report, and that we haven't added any new  
4 theories of infringement in Dr. Weaver's report that  
5 we didn't previously identify. And I will be able to  
6 establish that at a hearing. But, obviously, the  
7 Court needs to see the documentation of the evidence  
8 on that. So there are not hundreds of pages of new  
9 theories.

10 Is there additional evidence that we do in  
11 support of our theories and in support of the fact  
12 that these products and services infringe?  
13 Absolutely, because we had to go through eight million  
14 pages of documents, and we had to go through millions  
15 of lines of source code. And it took us weeks. Even  
16 their own witnesses said it would take that to  
17 decipher that source code.

18 So I feel like we're being faulted for having  
19 done our diligence on this to come forward with the  
20 evidence that establishes that these people  
21 overwhelmingly infringed these patents. And that's  
22 just not fair.

23 So if the Court wants to see on a theory by  
24 theory basis and on a product and services basis that  
25 there's one to one correspondence between our initial

1 contention that I did 30 days after the pretrial and  
2 Dr. Weaver's report, I'll show that, and I'll also  
3 show why we were hamstrung every step of the way, and  
4 why this was a teeth-pulling exercise to try and get  
5 the evidence from these guys to establish that they  
6 infringe, and to add that evidence in a disciplined  
7 matter into their report so they can see how it was  
8 that they infringe, and they couldn't say that they  
9 were prejudiced. And we did that all before the close  
10 of fact discovery.

11 I will tell you, Your Honor, three days  
12 before Dr. Weaver's report was due, the defendant's  
13 supplemented their non-infringement contentions and  
14 for the first time, one of their non-infringement  
15 contentions -- now, let me repeat that. Three days  
16 before Dr. Weaver's report was due they said, We don't  
17 sell computers. So we can't infringe.

18 And guess what, Your Honor? That's one of  
19 the bases for their summary judgment of  
20 non-infringement, and they gave that to us three days  
21 before Dr. Weaver's report was due, and now it's  
22 before you on summary judgment.

23 Now, how is that fair? We had to scramble,  
24 and we dealt with that in his report, but, obviously,  
25 we had to deal with that new non-infringement

1 contention raised for the first time three days before  
2 Dr. Weaver's report was due.

3 MS. STOLL-DeBELL: Your Honor, if I might  
4 respond briefly.

5 As far as us hamstringing them, we produced  
6 source code for all of the accused modules of the  
7 products in September. All of the code that their  
8 source code expert relies on is the code that we  
9 produced in September.

10 Mr. Robertson says he knows we used search  
11 indexes. That's because everybody uses search  
12 indexes. If you didn't, it would take forever to do a  
13 search. It would be like trying to search Moore's  
14 Federal Practical without an index. It would take too  
15 long.

16 Their source code expert in his declaration  
17 in support of their opposition said he had the source  
18 code in October. And there's absolutely no reason why  
19 they couldn't have disclosed that argument in  
20 December.

21 MR. ROBERTSON: Let me just address that. It  
22 would have been nice if that source code index  
23 argument had ended up in an interrogatory because that  
24 would have saved us a lot of time. You said exactly  
25 the opposite in your interrogatory answers.

1           Secondly, Your Honor, source code is not like  
2 opening up a book and just reading through it.  
3 There's an affidavit we put into evidence from our  
4 expert who had to make seven trips to D.C. to go into  
5 a secure room that they required us to do under a  
6 protective order to review that source code. He had  
7 to spend 350 hours to review that to come up with a  
8 search index, source code, that we then had to  
9 challenge and confront one of their experts on who  
10 finally conceded, Yes, we have a search index.

11           I challenge Ms. Stoll-DeBell to go back and  
12 show us in an interrogatory answer prior to December  
13 22, 2009, in which you indicated that you had a search  
14 index. That will resolve the issue. If you do that  
15 and it's there, I'll concede the point.

16           MS. STOLL-DeBELL: We didn't say we had a  
17 search index because it's not relevant. We said we  
18 searched every record of Item Master and we do, just  
19 like when you look at the index of a book, you are  
20 searching for something in the entire book. Just  
21 because you use an index to speed that up doesn't mean  
22 you're not searching the entire book. We never said  
23 we don't use search indexes. It's simply not  
24 relevant.

25           MR. ROBERTSON: The --

1 MS. STOLL-DeBELL: Don't interrupt me.

2 THE COURT: Hey, hey, hey. Settle down. One  
3 at a time. Go on.

4 MS. STOLL-DeBELL: If I may continue.

5 THE COURT: Yes.

6 MS. STOLL-DeBELL: We didn't say we use a  
7 search index because it's frankly not relevant. And I  
8 cannot understand or begin to understand how you might  
9 say that is a catalog. It doesn't have any --

10 THE COURT: All right. Wait just a minute.

11 I've just been sitting here listening to  
12 you-all. I may take another approach to simplifying  
13 the litigation. I may enjoin anyone from talking  
14 except Mr. Merritt and Mr. Carr. That'll be the end  
15 of it. There will be nobody else talking. There will  
16 be nobody else litigating the case. They will be the  
17 ones who say everything, who make every decision.  
18 That might settle the case down a little bit because  
19 you-all fight like cats and dogs, and it's ridiculous.

20 Now, I am looking for a way to simplify this  
21 case. I do not see how you can put in 800 pages of  
22 testimony about experts and they get an opportunity to  
23 cross-examine in four days. I don't see how that  
24 happens. Now, maybe there's a way to do it.

25 You-all are going to have to figure out a way

1 to try to simplify this case, and I want you-all to  
2 start thinking about it. Unless you hear differently  
3 from me, what I want to hear on the 28th -- or 29th,  
4 is it?

5 MR. ROBERTSON: The 28th.

6 THE COURT: The 28th. Is argument on motions  
7 in limine that remain, which I would like to be told  
8 on Tuesday that there are precious few of.

9 I reserve on Bilski. I have to read the  
10 response, and the reply is not due until Monday. So I  
11 can't make any comment on that.

12 I don't think this is a summary judgment  
13 case. And I'd like to know and understand exactly why  
14 it is when you get around to it, Mr. Robertson, that  
15 you think you can have so many different experts when  
16 the order says what it did.

17 The issue on the motion to strike that I have  
18 been reading seems to be that Lawson was told to stay  
19 with its contentions on invalidity and  
20 non-infringement. And you're going to have to do the  
21 same thing.

22 And if you have new theories, Mr. Robertson,  
23 that aren't disclosed in your infringement  
24 contentions, then to the extent your expert report  
25 raises new theories of infringement, you're not going

1 to be able to put those on.

2 Now, I need to know first -- I can't tell  
3 from reading these briefs which you concede are new  
4 theories that you want to be able to put in, new  
5 theories of infringement, because of something that  
6 Lawson did that made it impossible for you to know  
7 about the contention and which of the information in  
8 these expert reports is simply more detail in support  
9 of a theory that was announced in the non-infringement  
10 contentions.

11 The purpose of having you-all identify your  
12 contentions is so you'd know what they were. And then  
13 the experts, of course, are entitled to go look at  
14 that and develop evidence about it. And the evidence  
15 is going to be broader than the contention, per se, as  
16 a general proposition, it seems to me.

17 What I remember about Lawson is that Lawson  
18 had these new contentions. We weren't talking about  
19 the expert reports adding expansive documentation. We  
20 were talking about there being new contentions. And  
21 you-all have to sort that out. And somebody has to  
22 show me in some kind of simple, easy, understood way  
23 what's new.

24 MS. STOLL-DeBELL: Your Honor, if I may  
25 speak. We listed six new arguments on pages 3 and 4

1 of our opening brief. Those are the arguments that we  
2 contend are new. The doctrine of equivalents, for  
3 example.

4 THE COURT: Well, the doctrine of  
5 equivalents, that's going the way of the wicked  
6 because that's no longer an issue in the case. Is it,  
7 Mr. Robertson?

8 MR. ROBERTSON: No, sir. In fact, let me  
9 just take that off the table right now. Just a little  
10 bit of recent history, Your Honor. We got your  
11 Markman order on the Friday evening before the Monday  
12 our expert reports were due. Pursuant to the Court's  
13 guidance, I had done analyses both under our claim  
14 construction and Lawson's claim construction, which  
15 included a DOE analysis if their claim construction  
16 prevailed. It didn't.

17 I'm not presenting evidence at trial on that.  
18 It stayed in the expert report, Your Honor, because we  
19 were hard pressed to get that out. We indicated  
20 that in our reply brief.

21 THE COURT: Why didn't you do this? Why  
22 didn't you call the other side and say, Look, there's  
23 a section in there about the doctrine of equivalents,  
24 and, obviously, you don't need to deal with that  
25 because, given the Court's claim construction, we're

1 not putting this on? That would have solved the whole  
2 problem. They do have telephones up there where you  
3 are, don't they?

4 MR. ROBERTSON: Yes, sir, we do. And your  
5 point is well taken. I thought we said that in our  
6 reply.

7 THE COURT: Yeah, but the reply is a long  
8 way -- there's a lot of blood that's been spilled  
9 before you get to the reply, for Pete's sake.

10 MR. ROBERTSON: The point is well taken, Your  
11 Honor.

12 THE COURT: I want you-all to sit down and  
13 talk about ways to simplify this case. And I truly am  
14 not going -- this case in not going to be tried by  
15 proxy. I'm going to go study ResQ and those other  
16 cases that you cite, but the way I read cases and the  
17 authorities that you have cited that I have been able  
18 to read, they don't do away with the basic formulation  
19 of the hypothetical negotiation.

20 And throwing in expert reports that are based  
21 on figures that came as the direct result of  
22 litigation pending appeal or retrial or whatever can  
23 hardly be said to be a party not acting under  
24 compulsion.

25 In this case, this was something that I was

1 fairly comfortable in my basic knowledge about. And  
2 the way you-all have cited the cases lead me to  
3 believe that maybe all that I learned, I didn't learn  
4 very well. So I have to go back and read this stuff.

5 But the things I have read do not prove out  
6 the point that I'm wrong. They prove out the point  
7 that I'm right. I don't know what that does to your  
8 case. I don't know whether it means that you don't  
9 have any damage calculations for the reasonable  
10 royalty or what. But we're not going to try a case  
11 where we have to let Lawson put in evidence about why  
12 these figures got where they were, and, i.e., that  
13 there was litigation, and they were thinking about  
14 this consideration, the other people were, and it had  
15 to be done this way in order to resolve the case.

16 You'd end up trying a sub case, and you'd end  
17 up with Rule 403 problems that are very, very  
18 problematic.

19 So I don't know what that does to your  
20 damages case, but I've got this question. Given that  
21 eight million pages you-all had to read, what are your  
22 total legal fees in the case do you estimate right  
23 now, Mr. Robertson? And I'm not going to hold you to  
24 it.

25 I'm sure you, like all law firms, get

1 by-the-minute updates on what you've billed and what  
2 your collections are, and all that stuff.

3 Roughly, what are the legal fees so far?

4 MR. ROBERTSON: Well, Your Honor,  
5 respectfully, I'd like not to share that with counsel  
6 for Lawson unless it's going to be a mutual exchange.  
7 And I'm not sure that Ms. Stoll-DeBell is prepared to  
8 do that.

9 THE COURT: I want to know from her what the  
10 net worth of Lawson is.

11 MS. STOLL-DeBELL: The net worth of Lawson?

12 THE COURT: Yes.

13 MS. STOLL-DeBELL: I don't know the answer to  
14 that, Your Honor.

15 THE COURT: Here's what you better do. You  
16 better start thinking about it. You ought to think  
17 about how much legal fees he's got because if he wins,  
18 he gets legal fees. If he wins on willfulness, he's  
19 going to get treble damages. And the case is going to  
20 end up going to a jury.

21 And your client is not a big player in the  
22 world, according to Mr. McDonald. I don't know if  
23 that's true or not. They are small fish, he led me to  
24 believe.

25 And maybe you-all ought to be thinking about

1 the economics of doing what you're doing as far as  
2 your client's interest is concerned is the point I'm  
3 making.

4 I bet your legal fees may be \$30 million  
5 before it's over. Is Lawson worth \$30 million?  
6 Because if you lose, you're going to have to pay the  
7 legal fees.

8 MS. STOLL-DeBELL: Your Honor, Lawson --  
9 depends on the pond that you're looking at whether  
10 Lawson is a big fish or a small fish.

11 THE COURT: I'm looking at the total number  
12 of dollars that constitute the shareholders' equity.

13 MS. STOLL-DeBELL: I don't know the answer to  
14 that.

15 THE COURT: Well, I'm not asking --

16 MS. STOLL-DeBELL: I do know they have  
17 hundreds of millions of dollars in sales.

18 THE COURT: Okay. Well, you-all ought to  
19 give some thought to all this because --

20 MR. ROBERTSON: This is Mr. Robertson. We  
21 have been, and we've been making efforts to meet with  
22 Judge Dohnal. And, unfortunately, we weren't able to  
23 meet until August 19 was the only date the parties  
24 could agree on. But we are going to meet on  
25 August 19. And I can speak for ePlus that we're going

1 to approach that meeting with a very open mind and try  
2 and resolve these matters, taking into account the  
3 observations you just made.

4 MS. STOLL-DeBELL: And I can represent the  
5 same for Lawson, Your Honor.

6 THE COURT: Well, when you come to those  
7 settlement meetings, I don't know what Judge Dohnal  
8 has told you, but I'm going to tell him that I want a  
9 business person there who is at the top levels of the  
10 company, not one of the general counsel, who can hear  
11 all this stuff that goes on and the arguments that are  
12 being made because sometimes business people have a  
13 way of cutting through and understanding that the  
14 lawyers on their side aren't making any sense, and  
15 that helps settle the case.

16 So the same is true for both of you. And I'm  
17 going to tell him I think it's not going to get  
18 anywhere unless you get what Judge Williams calls your  
19 big marbles there.

20 Now, this, folks, is out of hand. What's the  
21 trial date on this case?

22 MR. ROBERTSON: September 13, Your Honor.  
23 This is Mr. Robertson.

24 THE COURT: Well, I'm going to continue  
25 reading these things, but I just think that I'm going

1 to want to talk to you at least on July 28 and maybe  
2 before that about a means of cutting this trial down  
3 to manageable proportions because you-all have it way  
4 out of hand right now. Every issue gets litigated to  
5 the nth degree and that isn't the way that I think is  
6 the best way to resolve this case.

7 I recognize that this is not a simple matter,  
8 and it doesn't lend itself to simple solutions, but  
9 sometimes finding a simpler approach after you have  
10 been through all the wheatfield that you all have been  
11 going through can be accomplished once you've gone  
12 through the wheatfield and you've realized that there  
13 is a lot of wheat and a lot of chaff, and you have to  
14 figure out which is which.

15 So I'll be expecting to hear from you on the  
16 date set for these motions.

17 MR. MERRITT: Your Honor, this is Craig  
18 Merritt. May I ask a question?

19 THE COURT: Yes sir.

20 MR. MERRITT: What I'm hearing are two big  
21 picture issues. One is the scope of proof at trial  
22 and the other is the number of the motions in limine.  
23 Would it help if we tried to confer intensively over  
24 the next few days and gave to the Court some sort of  
25 at least an oral report in the middle of next week so

1 that if we have narrowed things down, you won't be  
2 wasting time grinding through a lot of paper?

3 THE COURT: Well, it would help, but I've  
4 read a good many of Lawson's motions in limine in  
5 preparation for this phone call. It doesn't take a  
6 long time to read and digest basically the points.

7 What I haven't done is gone back and reviewed  
8 some of the detailed proofs that are offered and the  
9 details of some of the case law that has been offered.  
10 I have read some of the case law on topics that seemed  
11 to me that are going to drive the case like what are  
12 you going to be able to prove in the way of damages.  
13 And I think there are problems there.

14 I, frankly, think that the pretrial order  
15 means what it says, and it's been interpreted that way  
16 for years. So I don't understand how we're going to  
17 have any issue on that. And I don't know what that's  
18 going to do to the trial of the case, but somebody  
19 better be doing some thinking about those things.

20 I'm not doing it just to take work off my  
21 shoulders. That's not the point. I've had cases that  
22 have had a lot more motions in limine than this. It's  
23 the quality of them and the topics to which they are  
24 directed that are troubling me. And not just the  
25 quality of the motions, but I mean the quality of the

1 issues.

2 I don't mean to criticize the articulation of  
3 the theories in the papers. That's not the point.  
4 The point is, what on earth is going on in this case.  
5 I sometimes apprehend that the lawyers don't get  
6 along, and it drives an awful lot of the decisional  
7 process, and there's a lot of mudslinging that need  
8 not be done.

9 All right. I want to hear from you in the  
10 middle of the week if you have been able to narrow  
11 down some of these things. And I'll be reading the  
12 Bilski stuff first part of the week. I'll wait until  
13 it's ripe to read it. It reads better if I read  
14 different sections together.

15 All right. Then you better be prepared to  
16 deal with motions in limine. What is the title of  
17 that motion? Motion to strike, is that what it is?  
18 Yes, the motion to strike on the 28th.

19 And before then, as to that motion to strike,  
20 I want you to figure out some way in a very simple way  
21 to identify this is the contention -- I mean, these  
22 are the six -- what did you say there were? Six or  
23 seven of them?

24 MS. STOLL-DeBELL: If they don't intend to go  
25 forward with the doctrine of equivalents, then we're

1 looking at five new arguments. And those are listed  
2 on page 4 of our brief. And there are one or two  
3 sentences describing what we contend is new.

4 THE COURT: Yeah. And I want you to show me  
5 in something very simple why it's not new. It's one  
6 thing to say the theory is new, i.e., the theory of  
7 infringement is new. It's another to say there's an  
8 old theory and you've changed grounds on it entirely  
9 from something else. And it's yet another thing to  
10 say it's an old theory and this is just backup for the  
11 same basic approach to it or I've broadened the  
12 approach to it in a way that doesn't change the nature  
13 of the contention.

14 Do you understand the distinction,  
15 Mr. Robertson?

16 MR. ROBERTSON: Absolutely, Your Honor.

17 THE COURT: Then I wanted you to figure out  
18 some simple way to do that.

19 Now, Mr. Willett -- is he not on there?

20 MR. ROBERTSON: No, he's not.

21 THE COURT: Well, go get Mr. Willett and have  
22 him show you what we used in the WiAV case. What we  
23 had is a contention that somebody's declaration in a  
24 summary judgment went beyond the expert report and  
25 therefore constituted a new expert report. And the

1 way we resolved it there was to take what was objected  
2 to as not supported by the expert report and as  
3 constituting new material, and then having that  
4 highlighted in one color. And then having the other  
5 side say, Well, here is where it actually appeared in  
6 the expert opinion, highlighted and keyed to a tabbed  
7 exhibit that I could immediately turn to and look at  
8 and say, Oh, there it is or there it isn't.

9 We had 26 such theories and I dealt with them  
10 in relatively short order. I'm not saying that that  
11 is the way to approach the matter in this case, but it  
12 is a way of simplifying things so that I can  
13 understand precisely where you are and what your  
14 evidence is, and why you say it's different, and why  
15 you say it's not different. And I don't have that yet  
16 and I want it. And I want it next week by Wednesday.

17 All right, Mr. Robertson?

18 MR. ROBERTSON: Understood, Your Honor. One  
19 point of clarification because Your Honor had  
20 indicated that you want to hear on the 28th the  
21 motions in limine and the motion with respect to  
22 striking aspects of the Weaver report.

23 I understand the process Your Honor wants us  
24 to go through in order to be able to wrap your arms  
25 around that issue.

1           Your Honor also indicated that I thought at  
2 one point, please correct me if I'm wrong, that you  
3 didn't need to hear argument on the motion for summary  
4 judgment, holding the Bilski motion in reserve,  
5 because you haven't had the full briefing on it.

6           THE COURT: I don't know whether I want  
7 argument on Bilski or not because I haven't done  
8 anything but read the opening brief.

9           MR. ROBERTSON: I know that. I'm sorry. I  
10 meant the other motion for summary judgment that has  
11 the six or seven separate issues. I thought you  
12 indicated you thought there were disputed issues of  
13 fact.

14           THE COURT: I think there are disputed issues  
15 of fact in every one of them.

16           MR. ROBERTSON: Just for preparation  
17 purposes, Your Honor, since I'm arguing that motion,  
18 I'd just like to be able -- do I not need to address  
19 on the July 28 hearing?

20           THE COURT: I'm going back and review all  
21 this stuff over the weekend, and I'll let you know  
22 Monday if I want argument on the invalidity and  
23 infringement summary judgment motions.

24           MR. ROBERTSON: Thank you, Your Honor. That  
25 will be appreciated.

THE COURT: And the marking and the written description. Whatever is in that complete set other than Bilski. There are five or six different topics in that motion, and then there's a separate one on Bilski.

6                   My inclination right now is there are  
7 disputed issues of fact on all of those, and I will  
8 let you know on Monday whether I want any argument or  
9 not.

10 MR. ROBERTSON: Thank you. Your Honor.

11 THE COURT: All right. Thank you all very  
12 much.

13 MR. CARR: Thank you, Judge.

14 MS. STOLL-DeBELL: Thank you.

15 MR. ROBERTSON: Thank you, Judge.

17 (The proceedings were adjourned at 4:53.)

19 I, Diane J. Daffron, certify that the  
20 foregoing is a true and accurate transcription of my  
21 stenographic notes.

/s/

7 / 19 / 10

DIANE J. DAFFRON, RPR, CCR

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DATE